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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES WILLIAMS,

Defendant and Appellant.

C060291

(Super. Ct. No.
9112796)

In 1991 defendant Charles Williams pled no contest to possession for sale of lysergic acid diethylamide (LSD) (Health & Saf. Code, § 11378) in exchange for an agreement that he would be placed on felony probation.¹ He failed to appear for sentencing until 2008, at which time he was sentenced to state prison for a term of 16 months. Defendant contends the trial court imposed various fees, penalties, and assessments in

¹ Defendant was initially charged under an "aka" of Harold Arron Weinstein.

violation of the constitutional prohibition against ex post facto application of laws, and the People concede the issue. We shall accept their concession with one exception: for reasons stated herein, we shall strike, rather than reduce, the penalty pursuant to Government Code section 76000.

FACTUAL BACKGROUND

According to the probation report in this matter, during a search of defendant by police officers in 1991, 149 "hits" of LSD and some marijuana were found in his pants pockets.

At defendant's sentencing in 2008, the trial court imposed a \$50 laboratory fee pursuant to Health and Safety Code section 11372.5, a \$150 drug program fee pursuant to Health and Safety Code section 11372.7, and a \$200 suspended parole revocation fine pursuant to Penal Code section 1202.45.

The laboratory fee imposed included the following penalties and assessments, for a total of \$190: a \$50 penalty pursuant to Penal Code section 1464, subdivision (a) (state penalty); a \$10 surcharge pursuant to Penal Code section 1465.7, subdivision (a) (state surcharge for deposit in general fund); a \$25 penalty pursuant to Government Code section 70372, subdivision (a)(1) (state court construction penalty); a \$35 penalty pursuant to Government Code section 76000, subdivision (a)(1) ("additional penalty"); a \$10 penalty pursuant to Government Code section 76000.5, subdivision (a)(1) (penalty for support of emergency medical services); a \$5 penalty pursuant to Government Code section 76104.6, subdivision (a)(1) (penalty for support of implementation of

the DNA Fingerprint, Unsolved Crime and Innocence Protection Act); and a \$5 penalty pursuant to Government Code section 76104.7, subdivision (a) ("state-only penalty" for deposit into the DNA Identification Fund).

The drug program fee imposed included the following penalties and assessments, for a total of \$570: a \$150 penalty pursuant to Penal Code section 1464, subdivision (a); a \$30 surcharge pursuant to Penal Code section 1465.7, subdivision (a); a \$105 penalty pursuant to Government Code section 76000, subdivision (a)(1); a \$30 penalty pursuant to Government Code section 76000.5, subdivision (a)(1); a \$75 penalty pursuant to Government Code section 70372, subdivision (a)(1); a \$15 penalty pursuant to Government Code section 76104.6, subdivision (a)(1); and a \$15 penalty pursuant to Government Code section 76104.7, subdivision (a).

DISCUSSION

Defendant contends the portion of the penalties and assessments added to his laboratory and drug program fees pursuant to Penal Code section 1465.7 and Government Code sections 70372, 76000.5, 76104.6, and 76104.7 must be stricken because these statutes were enacted after the date of his offense and, thus, any amounts imposed as part of his sentence violated the constitutional prohibition against ex post facto application of laws. Similarly, defendant asserts that the \$200 suspended parole revocation fine imposed pursuant to Penal Code section 1202.45 must be stricken because that statute, as

well, had not been enacted at the time he committed his offense. We agree with these contentions.

The ex post facto clauses of the federal and state Constitutions prohibit certain categories of legislation, including laws ""which make[] more burdensome the punishment for a crime, after its commission."" (People v. McVickers (1992) 4 Cal.4th 81, 84; see U.S. Const., art. 1, § 10, cl. 1 and Cal. Const., art. 1, § 9.) "[A] penalty assessment cannot be imposed without violating the constitutional prohibition of ex post facto laws if (1) the defendant's criminal act preceded its enactment; and (2) the assessment is in fact a penalty." (People v. Batman (2008) 159 Cal.App.4th 587, 590 (Batman).) "The clause thus protects defendants from retrospective legislation with a punitive effect or purpose." (McVickers, supra, 4 Cal.4th at p. 85.)

Under ex post facto principles, the amount of a fine is determined as of the date of the offense. (See People v. Saelee (1995) 35 Cal.App.4th 27, 30.)

Defendant committed the offense in question in May 1991. Penal Code section 1465.7 went into effect in 2002 (Stats. 2002, ch. 1124, § 46, eff. Sept. 30, 2002), as did Government Code section 70372 (Stats. 2002, ch. 1082, § 4). Government Code section 76104.6 became law in 2004 (Prop. 69, § IV.1, approved Nov. 2, 2004, eff. Nov. 3, 2004), and Government Code sections 76000.5 and 76104.7 were enacted in 2006 (Stats. 2006, ch. 841, § 1 [Gov. Code, § 76000.5]; Stats. 2006, ch. 69, § 18, eff. July 12, 2006 [Gov. Code, § 76104.7]). This court has

ruled that the penalties imposed under Penal Code section 1465.7 and Government Code sections 70372 and 76104.6 are punitive for purposes of ex post facto considerations. (*People v. High* (2004) 119 Cal.App.4th 1192, 1197 (*High*) [re: Pen. Code, § 1465.7]; *id.* at pp. 1198-1199 [re: Gov. Code, § 70372]; *Batman, supra*, 159 Cal.App.4th at pp. 590-591 [re: Gov. Code, § 76104.6].) We agree with defendant that the reasoning supporting our determination as to these statutes—the assessments were designated as penalties, were calculated in proportion to criminal culpability (i.e., based on the amount of the fine imposed), and were collected using the provision for collecting the state penalty assessment—leads to a similar conclusion as to Government Code sections 76104.7 and 76000.5. As none of these statutes were in effect when defendant committed the offense at issue, the sums imposed pursuant to these statutes must be stricken.

The same is true with regard to Penal Code section 1202.45, which was added in 1995 and requires “an additional parole revocation restitution fine” (equal to the amount imposed pursuant to Penal Code section 1202.4) be assessed but suspended unless parole is revoked. (Stats. 1995, ch. 313, § 6, p. 1758, eff. Aug. 3, 1995.) Imposition of a fine under section 1202.45 is subject to the proscriptions contained in the ex post facto clause. (*People v. Callejas* (2000) 85 Cal.App.4th 667, 678.) Accordingly, this fine also must be stricken.

Defendant also contends that the fines and penalties imposed under Penal Code section 1464, Government Code

section 76000, and Health and Safety Code section 11372.7 must be reduced to the amounts required under these statutes at the time of his offense.

Shortly after defendant committed the instant offense, the "state penalty" under Penal Code section 1464, subdivision (a)(1) was increased from \$7 to \$10 for every \$10 increment of fine imposed for a criminal offense. (Stats. 1991, ch. 90, § 60, pp. 451-453, eff. June 30, 1991.) This statute constitutes "a 'garden variety' fine" and is subject to the proscription against ex post facto application of law. (*High, supra*, 119 Cal.App.4th at p. 1197.) Thus, the penalty must be adjusted to the amount required at the time of defendant's offense.

On the other hand, the penalty imposed pursuant to Government Code section 76000, subdivision (a)(1) must be stricken. That section, which currently imposes an additional penalty of \$7 for every \$10 increment of fine imposed, did not go into effect until July 1991, after defendant committed the subject offense. (Stats. 1991, ch. 189, § 11, p. 1438.) A former version of the statute, which contained a more complicated penalty scheme, was repealed in 1989. (Stats. 1989, ch. 1467, § 4, p. 6554.) It is undisputed that the penalty set forth in this section is punishment for purposes of applying the statute retroactively and, accordingly, must be stricken.

Defendant's final contention is that the drug program fee imposed pursuant to Health and Safety Code section 11372.7, subdivision (a) should be reduced from \$150 to \$100, which was

the amount specified by the statute at the time he committed his offense. (Stats. 1986, ch. 1027, § 3, p. 3558.) As noted by defendant, there is case law suggesting a split of authority as to whether the fee imposed under this statute is punitive, although there are no cases that have addressed the issue in the context of an ex post facto analysis. (Compare *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1696 with *People v. Vega* (2005) 130 Cal.App.4th 183, 195 [analyzing Health & Saf. Code, § 11372.5, subd. (a)].) Without deciding the issue, we will accept the People's concession.

Because imposition of the fees and fines in question in this case constitutes an unauthorized sentence, we are authorized to correct the error without the need to remand the matter to the trial court. (*People v. Smith* (2001) 24 Cal.4th 849, 854; *People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1411.)

DISPOSITION

The judgment is modified as follows: the drug program fee under Health and Safety Code section 11372.7 is reduced to \$100; all penalties and assessments imposed under Penal Code section 1465.7 and Government Code sections 76000, 76000.5, 70372, 76104.6, and 76104.7 are stricken; and the parole revocation fine under Penal Code section 1202.45 is stricken. The penalties under Penal Code section 1464 are reduced to \$35 in conjunction with the laboratory fee and \$105 in conjunction with the drug program fee. As modified, the judgment is affirmed. The trial court is directed to correct the abstract of judgment accordingly and to send a certified copy of the

amended abstract to the Department of Corrections and
Rehabilitation.

RAYE, J.

We concur:

SCOTLAND, P. J.

HULL, J.